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HAROLD B. WILLEY, C

In the

Supreme Court of the United States

October Term, A. D. 1954

No. 680

ISTHMUS DEVELOPMENT COMPANY,
Petitioner,

v.

EDWARD R. BURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

EDWARD R. BURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl A. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

OPINIONS OF THE COURTS BELOW

A. The District Judge did not file a formal opinion. A copy of the Order of Dismissal is appended to this petition (Appendix i) and also appears at R. 252.

B. A copy of the opinion of the Court of Appeals for the Fifth Circuit is appended hereto (Appendix ii), appears at R. 262, and is reported in 218 F. 2d 353.

II.

JURISDICTION

A. The date of the judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed and of its entry is January 12, 1955. (Appendix xiii; R. 272.)

B. The date of the order denying a Petition for Rehearing is February 3, 1955. (Appendix xiv; R. 286.)

C. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

III.

QUESTIONS PRESENTED FOR REVIEW

A. In this suit brought in the United States District Court for the Northern District of Texas by a citizen of New York against a citizen of Texas, arising out of voluntary transactions between them occurring in the Republic of Mexico and governed by its laws, did the District Judge commit reversible error in sustaining a motion to dismiss on the ground that the more convenient and proper forum was the Republic of Mexico?

Had the suit been brought in a Texas Court, such Court would have declined jurisdiction because of: 1. the difference between the law of Mexico and the law of Texas, 2. the ability of the plaintiff to subject the defendant to judicial process in Mexico and enforce a judgment there, and 3. the burden placed on the Texas courts of adjudicating rights originating outside of the State.

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With respect to the doctrine of *forum non conveniens* generally, the proof discloses, and it is presumed the District Judge found: 1. that the defendant was amenable to process in Mexico, 2. that the controversy must be decided according to the law of Mexico, 3. that the defendant's witnesses reside in Mexico, and 4. that the equipment sought to be recovered and the only assets out of which a money judgment might be satisfied are located in that country.

IV.

STATEMENT OF THE CASE

In June, 1952, the Respondent, Edward R. Burt, entered into a contract with Petroleos Mexicanos, a Government Institution, to drill for oil in certain areas in the States of Chiapas and Tabasco in Mexico (R. 32). Being without experience, equipment or personnel to perform the contract, the Respondent initiated negotiations with Petitioner to furnish the wherewithal by which Respondent could perform his contract. (D. 4, R. 152, D. 1, R. 150, R. 98.) The negotiations resulted in a written instrument signed by the parties (R. 16), the payment by Respondent of advance drilling-rig rental amounting to $20,000.00, and the deposit of $7,500.00 to defray anticipated expenses. (D. 12, R. 165.) Respondent also placed in Petitioner's possession welding equipment and a bulldozer to be used in the operation (R. 3). Following this commitment on November 10, 1952, Respondent on November 29, 1952, sent Petitioner a telegram in which Respondent stated he

had decided not to proceed because of many factors over which he had no control. (R. 27, R. 180.)

Respondent, a resident and citizen of New York, sued the Petitioner, a Texas corporation, in the United States District Court for the Northern District of Texas, to recover the $27,500.00 cash previously paid by him to Petitioner and for the value of the bulldozer and welding equipment, or in the alternative, for the restoration of possession of such personal property which was located at Petitioner's camp in the Republic of Mexico. (R. 1-5.)

The Petitioner filed a motion urging the dismissal of the suit because the District Court was without jurisdiction and because the forum was an inconvenient one. (R. 48.)

In support of the motions Petitioner alleged: (1) that all of the transactions pleaded occurred in Mexico and were governed by the laws of that Republic, a Civil Law nation whose laws the Federal District Court of Texas is not empowered to administer or enforce because of the difference between the Common Law and the Civil Law; (2) that Petitioner was organized as a "Western Hemisphere Trade Corporation" (see 56 Stat. 838; 26 U. S. C. A. 109), all of whose business other than the purchase of equipment in the United States had been and was being conducted in Mexico; that all of its records were in Mexico and all of the individuals involved in the negotiations with Respondent were residing and working in Mexico; (3) that Petitioner was amenable to process in Mexico; (4) that the operations being carried on by Petitioner at that time re-

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quired the constant presence and supervision of R. E. O'Donnell, Petitioner's General Manager in Mexico, and that it would cause serious hardship to Petitioner for him and the other individuals to be present for the trial in Texas; (5) that the Respondent was simply seeking to vex and harass Petitioner by the institution of the suit in Texas; (6) that all of Petitioner's assets except for some $4,000.00 or $5,000.00 were located within the Republic of Mexico and any judgment which the Respondent might obtain could not be enforced by the United States District Court for the Northern District of Texas; (7) that it would be an imposition upon the citizens of the Northern District of Texas who might be required to serve as jurors to spend their time in attempting to solve a controversy which was of entirely foreign interest. (R. 48.)

The allegations were supported by documentary evidence, affidavits (R. 55-70), oral depositions (R. 70-201), and oral testimony on presentation of the motions (R. 235-251). The counter affidavit filed by the Respondent (R. 231) does not disclose any material dispute as to the facts set out in the Petitioner's affidavits, the chief controversy being the legal effect of the matters sworn to. That the Petitioner is amenable to process in Mexico (R. 63) is uncontroverted.

The dispute between the parties on the merits is whether or not a contract was made between them and whether possession of the personal property is illegally detained Although a written instrument defining their obligations was signed by both parties (R. 16-26), the Respondent con-

tends that no contract was made and that he is entitled to a refund of the money paid by him as advance rental and deposit to defray expenses and the return of the equipment. The Petitioner contends that a contract was made, that Respondent breached the same, and that the only issue is one of accounting. The dispute must be resolved under the Mexican Law.

The District Judge sustained the *forum non conveniens* part of the motion and dismissed the case without prejudice (Appendix i; R. 252). The Court of Appeals for the Fifth Circuit reversed the judgment of dismissal and remanded the cause for further proceedings (Appendix xiii; R. 272). The Court of Appeals held that the District Court lacked discretion in this case to decline jurisdiction because both parties were American citizens and the only other competent tribunal was in a foreign country.

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

A. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Honorable Court in the cases of *Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462 (1941); Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947)*, and *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, and with the decision of the United States Court of Appeals for the Seventh Circuit in the case

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of *Trust Company of Chicago v. Pennsylvania Railroad Company, 183 F. 2d 640 (1950)*, and with the decision of the United States Court of Appeals for the Second Circuit in the case of *Mottolese v. Kaufman, 176 F. 2d 301 (1949)*, in all of which it is held that in diversity of citizenship cases a Federal Court is, in effect, only another court of the state in which it sits. The Texas courts would have declined jurisdiction had the suit been filed in the State Court. *Mexican National Railway Company v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28 (1896); Banco de Mexico v. Da Carmara (Tex. Civ. App., application for writ of error dismissed), 55 S. W. 2d 631 (1933); Johnson v. Employers Liability Assurance Corporation, Ltd. (Tex. Civ. App.—writ refused), 99 S. W. 2d 979 (1936); Carter v. Tillery (Tex. Civ. App.—writ refused—n. r. e.), 257 S. W. 2d 465 (1953).*

B. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of this Honorable Court in the case of *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, 1062 (1947)*, wherein the court holds that the doctrine of *forum non conveniens* leaves "much to the discretion of the court to which plaintiff resorts."

C. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Honorable Court in the cases of *Slater v. Mexican National Railroad Company, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904)*, and *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274*

(1912), and the decision of the United States Court of Appeals for the Second Circuit in the case of *DeSairigne v. Gould, 83 F. Supp. 270 (1949), affirmed, 177 F. 2d 515, cert. den., 339 U. S. 912, 70 S. Ct. 571, 94 L. Ed. 1338*, wherein it is held that when a defendant is amenable to process in a foreign country and has assets therein out of which a judgment can be satisfied, the proper forum for the trial of disputes arising under the laws of such foreign country is that country.

D. Should our assertions that conflicts exist be erroneous, we say, in the alternative, that the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but which should be, settled by the Supreme Court of the United States.

VI.

ARGUMENT AMPLIFYING REASONS

A. The courts of Texas would have declined to assume jurisdiction had this suit been filed in the State Court. Texas cases cited under Reason A., supra. This is recognized by the Court of Appeals in its opinion when it says "it is not disputed that there is no other available forum in this country." That the State Court would have declined jurisdiction was recognized by this Court in the case of *Slater v. Mexican National Railroad Company, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904)*. That suit was brought by *citizens of Texas* against a Colorado corporation for damages for a tort occurring in Mexico. To allow

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a citizen of New York to maintain a suit against a citizen of Texas in the Federal District Court of Texas when such suit could not have been maintained by a citizen of Texas against a citizen of New York, or even against another citizen of Texas, in the State Court, is to grant to the New York citizen a privilege not enjoyed by a Texas citizen in the Texas courts. *Johnson v. Employers Liability Assurance Corporation, Ltd. (Tex. Civ. App.—writ refused), 99 S. W. 2d 979 (1936); Carter v. Tillery (Tex. Civ. App.—writ refused—n. r. e.), 257 S. W. 2d 465 (1953).* The granting of such a privilege is contrary to the holding of this Court in *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, in which it was held that in diversity of citizenship cases a Federal Court is only another court of the state and that when one is barred from recovery in the State Court he should likewise be barred in the Federal Court.

B. *Herrick v. Railroad, 31 Minn. 11, 16 N. W. 413*, cited and quoted from by the Court of Appeals (footnote 4 of Opinion) as authority for denying the trial judge any discretion in this case, has been overruled by the Supreme Court of Minnesota. *Johnson v. Chicago B. & O. Railroad Company (Minn.), 66 N. W. 2d 763 (1954).* It is unquestioned that the Respondent's cause of action, if any, arose in Mexico, and that Petitioner is amenable to process in that country. Given those factors, the application of the doctrine of *forum non conveniens* leaves much to the discretion of the trial court. *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1946).* Among

the factors there listed and taken into consideration here, are the relative convenience of the parties, access to sources of proof, availability of compulsory process, cost of obtaining attendance of willing witnesses, enforcibility of a judgment, whether or not the plaintiff is seeking to harass the defendant by suing in an inconvenient forum and matters of public interest, including the burden imposed upon jurors of trying fact issues in controversies which are not of local interest.

In addition to those factors, there are to be considered in this case the reviewability of the trial court's decision in this case in which the applicable foreign law is a question of fact. *Hudson River Pulp & Paper Company v. H. H. Warner & Company (C. C. A. 2), 39 C. C. A. 452, 99 F. 187 (1900); Compania Trans-Continental de Petroleo, S. A. v. Mexican Gulf Sulphur Company (C. C. A. 2), 292 F. 846 (1923).* The prospect of a successful appeal from the trial court's decision on the merits would seem to be chimerical if the case must be tried before a judge whose conclusions of law are as final as are his findings of fact.

The question of comity of nations is also present since the transactions between the parties to this suit were incident to the performance by Respondent of a contract between him and Petroleos Mexicanos, a branch of the Mexican Government. (R. 32.) Petroleos may have some rights to be adjudicated and should be given an opportunity to be heard.

C. The relative convenience of the parties, access to sources of proof, availability of compulsory process for attendance of unwilling and the cost of obtaining the attendance of willing witnesses, the enforcibility of a judgment, whether Respondent is seeking to vex, harass, or oppress the Petitioner, and questions of public interest involved are fact questions. The findings of the trial judge on such fact questions are binding on the Court of Appeals in the absence of a showing that there is no substantial evidence to support them.

D. The voluntary dispersal of American citizens all over the world in various business ventures in which they deal with each other in foreign countries intending that their rights be determined according to the laws of the foreign countries, suggests the need for a decision by the Supreme Court of the United States on the question involving the application of the doctrine of *forum non conveniens* by the Federal Courts to such transactions. The Court of Appeals dismissed as obiter dictum the hereinafter quoted language of this Court in the case of *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912)*, viz:

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. * * * The only just grounds for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

There a citizen of Tennessee had sued a New Jersey corporation in the New Jersey Federal Court *(170 F. 369)* for damages for an injury sustained in Cuba.

WHEREFORE, Petitioner prays that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

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Amarillo, Texas,
Attorneys for Petitioner.

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APPENDIX

ORDER OF DISMISSAL

Filed: 7-7-54

In the United States District Court for the Northern District of Texas, Amarillo Division.

Edward R. Burt, Plaintiff,

v. Civil Action No. 1723.

Isthmus Development Company, a corporation, Defendant.

On April 30, 1954, the motion of the defendant, as contained in its First Amended Original Answer, that this is a forum non conveniens and that the more convenient and proper forum for the trial of this cause is the Republic of Mexico, was submitted to the Court and the Court, having considered said motion, the affidavits attached thereto, the depositions and admissions and requests for admissions on file, the testimony of the witness, R. E. O'Donnell, and the argument of counsel, is of the opinion that said motion should be sustained.

It is, therefore, Ordered, Adjudged and Decreed that this suit brought by Edward R. Burt v. Isthmus Development Company, a corporation, and the cross-action brought, subject to the action of the Court on its said motion to the convenience of the forum, by Isthmus Development Company, a corporation, against the plaintiff, Edward R. Burt, be, and the same are hereby, dismissed pursuant to the aforesaid motion without prejudices to the rights of the parties to further prosecute the same.

It is further Ordered, Adjudged and Decreed that all costs herein be taxed against the plaintiff, Edward R. Burt, for which the officers of this Court may have their execution.

Rendered and Entered this the 7th day of July, 1954.

/s/ JOS. B. DOOLEY,
(Jos. B. Dooley),
United States District Judge.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,206

EDWARD R. BURT,

Appellant,

v.

ISTHMUS DEVELOPMENT COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 12, 1955.)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and DAWKINS, District Judge.

DAWKINS, District Judge: Appellee is a corporation organized under the laws of and domiciled in the State of Texas. Appellant, a citizen of New York, brought this action for the recovery of money and equipment allegedly belonging to him and illegally retained by the appellee and

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for damages, in the total amount of $38,393.00. The original complaint alleged: that appellant was the owner of an oil and gas lease on certain lands in the Republic of Mexico and was desirous of obtaining experienced personnel to drill a test well thereon; that he and appellee's vice president, R. E. O'Donnell, conducted negotiations toward that end; that O'Donnell suggested appellee would furnish certain experienced personnel to do the work and that he (O'Donnell) would personally supervise the proposed operations; that appellant acquired a bulldozer and a welding unit and placed them in the custody of appellee at its camp in Mexico; that appellant subsequently mailed his checks to appellee in the sum of $27,500.00 to be used for the rental of a drilling rig and the purchase of certain supplies; that he expressly advised appellee not to use the money or equipment unless O'Donnell could personally supervise the operation; that appellee had not furnished experienced personnel, and O'Donnell had not personally supervised any activity and appellant had demanded the return of his money and equipment; that appellee had repeatedly refused to return either.

Appellee answered, alleging: that the parties had entered into a contract whereby appellee would furnish personnel for drilling operations and would conduct such operations in appellant's behalf; that if there were an agreement to have O'Donnell supervise such operations, which was denied, the agreement contemplated that his supervision would be carried on in connection with and subject to the performance of his other duties as vice president and gen-

eral manager of appellee's business in Mexico; that appellee had done some work and incurred certain expenses in preparing for such operations and that appellant repeatedly refused to pay these expenses or advance sufficient sums for the rental of drilling equipment. A copy of the alleged contract was attached to the answer, and appellee made a cross-claim in the amount of $17,500.00 for alleged expenses and damages for breach of contract.

Appellant filed a reply in which he admitted that the document attached to appellee's answer was a true copy, but asserted that it was only a proposed contract which he had signed with the definite understanding that it would not constitute a contract or be executory unless and until appellee specifically agreed to and did furnish the personal supervision of O'Donnell. He averred that when he signed the document and returned it to appellee, he wrote an accompanying letter in which he made that position clear.

Stating that appellant's reply pleading set up "an entirely different fact situation," appellee filed a motion to dismiss "because the Court is without jurisdiction and because this is a forum non conveniens." In support of the motion appellee alleged: (1) that all of the transactions pleaded occurred in Mexico and were governed by the laws of that republic, a civil law nation whose laws the Federal District Court of Texas is not empowered to administer, (2) that appellee was organized as a "western hemisphere trade corporation" (see 56 Stat. 838; 26 U. S. C. A. 109), all of whose business other than the purchase of equipment in the United States is conducted in Mexico by arrange-

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ment with Petroleos Mexicanos, a branch of the Mexican Government; that all of its records are in Mexico and all of the individuals involved in the negotiations with appellant reside and work in Mexico; (3) that the operations being carried on by appellee at that time required the constant presence and supervision of O'Donnell and that it would be virtually impossible to have him and other individuals present for the trial in Texas; (4) that appellant was simply seeking to vex and harass appellee by the institution of the suit in Texas; and (5) that the contract between the parties specifically provided that the interpretation and performance should be governed by the laws of Mexico, both parties expressly submitting themselves to competent tribunals in the Federal District of Mexico and waiving the jurisdiction of any other court or courts.

Excerpts from a deposition of appellant and O'Donnell's testimony taken in support of the motion to dismiss are in the record. In addition to enlarging the position set forth in his pleadings, appellant did, in effect, admit that all of the negotiations occurred in Mexico. O'Donnell's testimony amplified the position taken by appellee in its motion to dismiss. The trial judge sustained the motion without opinion, and the appeal from his order raises the following questions: (1) is there discretion in the District Court to decline jurisdiction on the ground of inconvenience where both parties are American citizens, the suit is brought at the domicile of the defendant and the only other competent tribunal is in a foreign country; and (2) if such discretion exists, was it properly exercised in the instant case?

The statutory requirements of jurisdiction and venue are fully met in this case, and it is not disputed that there is no other available forum in this country. We have found no authorities directly passing upon the first point raised by appellant, although the general problem presented is not new.[1] There are judicial expressions to the effect that statutory grants of jurisdiction are absolute and cannot be ignored by courts in the exercise of discretion. See *Cohens v. Virginia, 6 Wheat. 264; Hyde v. Stone, 20 How. 170; Kline v. Burke Construction Company, 260 U. S. 226; The Neck (D. C., Wash.), 138 F. 144;* and *Momand v. Paramount (Mass.), 19 F. Supp. 102.* See also cases cited in *32 A. L. R. 6, et seq.*

That such expressions are unsoundly broad and general is clear, for it has also been held that there exists in the federal courts an inherent power to decline jurisdiction in the interest of justice; and the doctrine of *forum non conveniens* is now well established in federal practice. *Gulf Oil Corp. v. Gilbert, 330 U. S. 501; Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518.*

As early as 1897, in passing upon the propriety of the trial court's dismissal of a suit between a resident of Texas and a resident of Massachusetts on a cause of action arising in Mexico, this court remarked that "the right to sue is specifically granted by statute, and appears to be absolute." However, it proceeded to discuss and pass upon the merits of the defendant's contentions of inconvenience and

[1] Compare *The Saudades (Pa.), 67 F. Supp. 820.*

impropriety, although the doctrine of *forum non conveniens*, as such, was not then an integral part of the federal practice. *Evey v. Mexican Central Ry. Co., 5 Cir., 81 F. 294.* Similar decisions followed in *Mexican Central Ry. Co. v. Marshall, 5 Cir., 91 F. 933*, and *Mexican Central Ry. Co. v. Jones, 5 Cir., 107 F. 64.*

In admiralty, courts have often refused to entertain actions between aliens, or between citizens and aliens where foreign law would govern the issues, and have relegated the litigants to the foreign court. See, for example, *Canada Malting Co. v. Paterson Steamships, 285 U. S. 413*, and cases there cited; *United States M. & S. Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 2 Cir., 65 F. 2d 392.* See also *DeSairigne v. Gould (N. Y.), 83 F. Supp. 270, affirmed 2. Cir., 177 F. 2d 515.*

Very few such cases, however, has specifically applied the doctrine of *forum non conveniens* by name. Rather, such action has been explained on the ground that admiralty courts, like those of equity, have greater and more unrestricted jurisdictional discretion because of the nature of the proceedings over which they sit. *Grignon's Lessee v. Astor, 43 U. S. 319, 337; United States M. & S. Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, supra. See Mr. Justice Black, dissenting in *Gulf Oil Corp. v. Gilbert, 330 U. S. 512.* And the very fact that admiralty courts have wide and practical powers was held in at least one case to require the trial of issues thought by the trial court to impose too great a burden of inconvenience upon it and

the defendant. See *Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U. S. 684.*[2]

In the academic sense, there is much to be said in favor of appellant's contention that no discretion exists in this case. This nation has historically been most solicitous of its citizens' welfare and its courts exist as much for the adjudication of its citizens' controversies as for the enforcement of its laws. Particularly is that true with respect to the diversity of jurisdiction of the federal courts, for that jurisdiction was established because of the desire to insure a competent and impartial tribunal for citizens of different states.

Where a citizen has an option of bringing his action in one of two *United States* courts, it is neither unreasonable nor arbitrary to require him in a proper case to bring it in that court which can most conveniently and expeditiously determine the issues.[3] Congress has specifically granted the power to transfer in certain cases *(28 U. S. C. A. 1404)*, and there are many cases approving the declination of jurisdiction on the ground of inconvenience.

In all such cases, save the admiralty decisions previously mentioned, there has been at least one other forum *in the United States* in which the suit might have been brought.

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[2] In that case the Supreme Court remarked: "The doctrine [*forum non conveniens*] is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. * * * We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens." *339 U. S. 697.*

[3] "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them" *Gulf Oil Corp. v. Gilbert, 330 U. S. 506.*

The clash was between *United States* courts of concurrent jurisdiction, and we have found no cases in which a resident citizen suing in his own right was dispatched to a foreign court. It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong. Nevertheless, because we are of the belief that it is unnecessary to do so here, we are not prepared flatly to hold that no discretion exists in *any* such case to decline jurisdiction. Experience has taught that such a holding may prove unsound in extreme cases; and the Supreme Court in the *Swift* case, supra, declined to pass upon a similar point. We leave that question open.

We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country. We find no such circumstances or manifest injustice here; and discretion, if it exists, cannot sustain the trial court's action in dismissing the suit.

There are, no doubt, difficulties in attempting to determine and apply foreign law; but the necessity to do so often occurs. The federal courts in diversity cases often encounter difficulty in determining the law of the very state in which they sit. See, for example, *Meredith v. Winter Haven, 320 U. S. 228; Wright v. Paramount-Richards Theatres, 5 Cir., 198 F. 2d 303.* In such cases, the rules of

the foreign law and their interpretation are simply questions of fact, and the conclusion is as reviewable as any other fact issue. See *Liechti v. Roche, 5 Cir., 198 F. 2d 174; Daniel Lumber Co. v. Empresas Hondurenas, 5 Cir., 215 F. 2d 465.* A different situation might be presented if the federal court were being asked to enforce some equitable or otherwise unusual relief peculiar to the foreign law, but here the appellant is simply seeking a money judgment which, so far as the record shows, can be executed against appellee in Texas. The fact that success or failure depends upon the law of Mexico does not, of itself, justify dismissal.[4]

Neither are we impressed by the allegations that appellee's operations are carried on primarily in Mexico. It must be remembered that appellee is a *Texas corporation* and that this suit was brought at its *domicile* which its incorporators chose and established. So far as we know, appellee has no other place of business in this country; surely it cannot complain of being sued at its headquarters and domicile on the ground that a major portion of its actual operations occurs elsewhere.

Appellee's argument that all negotiations occurred in Mexico, that all its witnesses are there and that it will

[4] In *Evey v. Mexican Central Railway Co.*, supra, this court quoted from *Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413, and we think* the remarks are pertinent here: "Every day our courts are enforcing rights under foreign contracts where the lex loci contractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens." *81 F. 304.*

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cause an extreme hardship to remove its employees from their work in Mexico is a serious one. In different circumstances, it would be more meritorious; but here we are of the opinion that the obvious inconvenience to appellee is off-set by other factors. We again advert to the fact that appellee is being sued at its domicile—in the state where it chose to organize. Further, appellant himself is necessarily inconvenienced in having to prosecute his claim far removed from his own residence, and to force him to litigate in Mexico would only compound that disadvantage. It should also be observed that O'Donnell, the witness so heavily relied upon by appellee, was personally present in Amarillo when his testimony was taken in support of the motion to dismiss.

Appellee also contends that appellant is simply seeking to vex and harass it, citing several acts or "threats" on the part of appellant. The short answer to this contention is that there is nothing in the record to show that such acts, if they occurred, were not justified, or at least based upon good cause. In view of the other circumstances previously mentioned, we cannot ascribe that motive to appellant.

Appellee finally contends that its contract with appellant restricts the parties to Mexican courts in express terms. It is sufficient to point out that one of the important questions, probably the basic issue, raised by the pleadings is whether or not the negotiations ever matured into a contract. It would be incongruous to remand the appellant to

Mexico because of provisions in a contract the very existence of which is in dispute.

For the reasons assigned, the judgment of dismissal is reversed and the cause is remanded for further proceedings not inconsistent with the view expressed herein.

REVERSED AND REMANDED.

A True copy:
Teste:

.....
Clerk of the United States Court
of Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of January 12, 1955.

EDWARD R. BURT,

No. 15206. versus

ISTHMUS DEVELOPMENT COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court.

ORDER DENYING HEARING

Extract from the Minutes of February 3, 1955.

EDWARD R. BURT,

No. 15206. versus

ISTHMUS DEVELOPMENT COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.